Hon. John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RITA LEAPAI, Plaintiff, vs. COLLECTION BUREAU OF AMERICA, Ltd., Defendant.	No. 16-cv-00766-JCC DEFENDANT'S RULE 12(B)(6) MOTION TO DISMISS NOTED FOR HEARING: AUGUST 19, 2016

I. INTRODUCTION

Pursuant to Fed.R.Civ.P. 12(b)(6), defendant Collection Bureau of America, Ltd. ("CBA") moves to dismiss Plaintiff's Complaint. (Dkt 1).

Plaintiff, Rita Leapai, has not pleaded the facts necessary to state a claim on the theory alleged. Ms. Leapai attempts to allege a single claim under the Fair Debt Collection Practices Act ("FDCPA"). Ms. Leapai's sole claim is that she disputed a debt and CBA did not report the dispute to a credit reporting agency. Ms. Leapai did not allege when the credit reporting was made. Substantial and relevant legal authority, including authority by this court, holds that a debt collector must report a dispute to a credit reporting agency only when the dispute is already known by the debt collector when the report is made. However, the debt collector owes no duty to go back and contact a credit reporting agency if a debtor later disputes a debt.

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Under the *Twombly* and *Iqbal* standard, Ms. Leapai has not set forth sufficient facts to support the FDCPA claim she alleges. In fact, Ms. Leapai will not be able to amend the Complaint to state a claim without violating Fed. R. Civ. P. 11, as the correct date of the reporting will prove that there is no claim.

II. FACTS

While CBA reserves the right to challenge all facts that Ms. Leapai alleges in the Complaint, they will be accepted as true for purposes of this motion. In the operative facts in the Complaint, Ms. Leapai alleges as follows:

> 11. Defendant reported the Alleged Debt on the Plaintiff's credit report.
>
> 12. Plaintiff disputed the Alleged Debt directly with the Defendant with a dispute letter on November 19, 2015.
>
> 13. Plaintiff examined her credit report again on January 4, 2016 and found that Defendant had not removed the credit account nor marked it as "'disputed by consumer'" despite being required to do so by the FDCPA.

(Dkt 1 at 3 ¶¶ 11-13).

Ms. Leapai fails to identify a date on which the alleged credit reporting occurred.

III. POINTS AND AUTHORITIES

A. Standard on Fed. R. Civ. P. 12(b)(6).

Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir.1990). To sufficiently state a claim and survive a motion to dismiss, the complaint "does not need detailed factual allegations" but the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Mere "labels and conclusions" or the "formulaic recitation of the elements of a cause of action will not do." *Id.* The complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted). Apart from factual sufficiency, a complaint is also subject to dismissal where it lacks a cognizable legal theory, or where the allegations on their face "show that relief is barred" for some legal reason. *Balistreri*, 901 F.2d at 699; *Jones v. Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

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> In determining whether to grant a motion to dismiss, the Court must accept as true all "well-pleaded factual allegations" in the complaint. *Iqbal*, 129 S. Ct. at 1950. The Court is not, however, required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the Court required to accept "conclusory legal allegations cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).
>
> In general, the Court may not consider any material outside the pleadings in ruling on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint may be considered. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," may be considered in ruling on a Rule 12(b)(6) motion. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Also subject to consideration under Fed. R. Evid. 201 are matters of public record, of which the Court may take judicial notice. *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

Phillips v. World Pub. Co., 822 F. Supp. 2d 1114, 1117-18 (W.D. Wash. 2011).

CBA is not submitting any documents with this motion but, since Ms. Leapai alleges in ¶ 11 of the Complaint that there was credit reporting, CBA invites Ms. Leapai to submit the credit report she shared with CBA, and CBA will agree that the document should be considered under Fed. R. Evid. 201, without converting this motion into one for summary judgment.

B. Ms. Leapai did not plead sufficient facts to show liability.

A debt collector needs to report a dispute to a credit reporting agency only when the dispute is already known by the debt collector when the report is made. However, a debt collector has no legal duty to go back and contact the credit reporting agency if the debtor later challenges the debt. *See Hylkema v. Associated Credit Serv. Inc.*, 2012 WL 13681, at *1 (W.D. Wash. Jan. 4, 2012) (analyzing *Wilhelm v. Credico, Inc.*, 519 F.3d 416, 418 (8th Cir. 2008)). As the Western District of Washington opinion held:

> In *Wilhelm v. Credico, Inc.*, 519 F.3d 416, 418 (8th Cir. 2008), the Eighth Circuit found no affirmative duty to report the fact that a consumer disputed a debt absent a communication in which that fact should have been reported.

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> Instead, "if a debt collector elects to communicate 'credit information' about a consumer, it must not omit a piece of information that is always material, namely, that the consumer has disputed a particular debt." *Id*. The Court noted Federal Trade Commission (FTC) Staff Commentary to the FDCPA confirming its conclusion:
>
> 1. Disputed debt. If a debt collector knows that a debt is disputed by the consumer ... and reports it to a credit bureau, he must report it as disputed.
>
> 2. Post-report dispute. **When a debt collector learns of a dispute after reporting the debt to a credit bureau, the dispute need not also be reported**.
>
> *Id*. (citing FTC Staff Commentary, 53 Fed. Reg. 50097–02, 50106 (Dec. 13, 1988)) (emphasis in original).

Hylkema, 2012 WL 13681, at *7.

Other courts have followed the FTC Staff Commentary and found no violation of the FDCPA in this context. For example, the Tenth Circuit held:

> We agree with the Eighth Circuit's interpretation of § 1692e(8) that a debt collector does not have an affirmative duty to notify CRAs that a consumer disputes the debt unless the debt collector knows of the dispute and elects to report to a CRA. Because it is undisputed CMS never reported to a CRA, it was under no obligation to inform the CRAs the debt was disputed. Nor was CMS required to take steps to have the Ocwen Defendants' reporting reversed. Notably, the Federal Trade Commission comments indicate § 1692e(8) does not impose such an obligation even on a debt collector who had reported to a CRA and subsequently learned the debt was disputed: "When a debt collector learns of a dispute after reporting the debt to a credit bureau, the dispute need not also be reported." *Id.* at 50106.

Llewellyn v. Allstate Home Loans, Inc., 711 F.3d 1173, 1189 (10th Cir. 2013).

Likewise, in *In re Benson*, 445 B.R. 445 (Bankr. E.D. Pa. 2010), addressing the same issue, the bankruptcy court held:

> It is nowhere alleged that when it furnished the original information about the Plaintiff's debt, Med-Rev knew of any dispute as to such debt. It is alleged that the dispute was brought to Med-Rev's attention after it furnished information to the credit reporting agency. Complaint, ¶ 13. As a result no subsequent reporting requirement arose. The Complaint thus fails to make out an independent violation of the FDCPA.

Benson, 445 B.R. at 449-50. *See also Jacques v. Solomon & Solomon P.C.*, 886 F. Supp. 2d 429, 434 (D. Del. 2012).

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Yet more district courts have addressed this very issue and held that a debt collector has no legal duty to go back and contact the credit reporting agency if the debtor later challenges the debt. For example:

> Here, Plaintiff disputed the debt only after Aargon already submitted it to the credit reporting agencies. As noted above, Aargon first notified Plaintiff's credit reporting agencies of the debt on July 3, 2010. But Plaintiff himself did not actually dispute the debt until July 11, 2010, a week after Defendants reported his debt to the credit reporting agencies. (Third Am. Compl. ¶¶ 33, 30-36.) It is nowhere alleged that when Aargon furnished the original information about Plaintiff's debt, Aargon knew of any dispute as to the debt. Indeed, Plaintiff's allegations make clear that he disputed the debt one week after Aargon submitted the debt information to the credit reporting agencies. Because the dispute was brought to Aargon's attention after it furnished information to the credit reporting agency, no subsequent reporting requirement arose. Thus, Plaintiff's allegations in Count III fail to make out a violation of the FDCPA and should be dismissed.

Edeh v. Aargon Collection Agency, LLC, 2011 WL 2963855, at *4 (D. Minn. June 20, 2011), report and recommendation adopted, 2011 WL 2910750 (D. Minn. July 20, 2011).

> Further, the Court rejects Plaintiff's argument that NCO had an obligation to have the credit reporting agencies remove the ICNH credit account lines from Plaintiff's credit report. A debt collector does not violate the FDCPA by reporting a debt to a credit reporting agency. 15 U.S.C. § 1692(c)(b) ("... a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector."). Nor is a debt collector obligated to notify a credit reporting agency that a debt is disputed, or to request that a trade line account be removed from a credit report, if the debt collector is unaware that the debt is disputed when it first reports the debt to a credit reporting agency. The FTC 1998 Staff Commentary on the FDCPA directly addresses this issue … .

Phillips v. NCO Fin. Sys., Inc., 2014 WL 1405217, at *7 (E.D. Mich. Apr. 11, 2014).

> Several district courts have followed the *Wilhelm* court's approach. *See, e.g., Jacques v. Solomon & Solomon P. C.*, 2012 U.S. Dist. LEXIS 118092, *11 (D.Del.2012) ("The duty to report a debt under [Section 1692e(8)] arises only if one elects to report credit information"); *Donatelli v. Warmbrodt*, 2011 U.S. Dist. LEXIS 69207, *27–28 (W.D. Pa. 2011) ("There is no authority to support the proposition that a debt collector must inform the credit reporting agency that the consumer disputes the debt") (citation omitted); *Edeh v. Aargon Collection Agency, LLC*, 2011 U.S. Dist. LEXIS 79160, *11 (D. Minn. 2011) ("when a

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> debt collector learns that a debt is disputed only after the collector has reported the debt to the credit reporting agencies, the collector has no affirmative obligation to report the dispute"); *Benson v. Med-Rev Recoveries, Inc. (In re Benson)*, 445 B.R. 445, 449–50 (Bankr.E.D.Pa.2010) ("Plaintiff's premise is that a disputation of a debt after such debt is reported by a consumer reporting agency creates a duty on the entity that informed or furnished such information to the agency to update the credit report to reflect that such debt is disputed. This is incorrect...."); *Kinel v. Sherman Acquisition II LP*, 2006 U.S. Dist. LEXIS 97073, *53-54 (S.D. N.Y. 2006) (noting a "dearth of precedent" on the issue of whether a debt collector has an affirmative duty to report a dispute made after it initially reported the debt, relying upon the 1988 FTC Commentary, and stating that "the FTC Commentary has interpreted § 1692e(8) as not explicitly requiring a debt collector to update information about the disputed status of a debt about which it has not reported, or about which it has already reported prior to a consumer's dispute"); *Black v. Asset Acceptance, LLC*, 2005 U.S. Dist. LEXIS 43264, *13 (N.D. Ga. 2005) ("only if a debt collector reports a consumer debt to a credit bureau under Section 1692e(8) must he then also report that debt as disputed").
>
> Mr. Rogers urges the Court to interpret Section 1692e(8) as imposing a continuing duty on debt collectors to advise consumer reporting agencies that a debt has been disputed, even when the dispute occurs after the debt collector reports the debt and the debt collector has not reported the debt since the dispute. However, the cases he cites do not support his proposition

Rogers v. Virtuoso Sourcing Grp., LLC, 2013 WL 772865, at *3 (S.D. Ind. Feb. 28, 2013).

Here, Ms. Leapai has not alleged that CBA made any report to a credit reporting agency after Ms. Leapai allegedly disputed the debt. Indeed, Ms. Leapai has not alleged when the alleged credit report to a credit reporting agency was made. Without this information, Ms. Leapai has failed to state a claim. Such information is not only critical to placing CBA on notice of the allegations against it, it may be dispositive of the case if the credit reporting were done before she disputed the debt. CBA also believes that amending the Complaint to add an allegation that the reporting was done subsequently will be a violation of Rule 11.

IV. CONCLUSION

CBA requests that this Court dismiss Ms. Leapai's Complaint where Ms. Leapai has not pleaded the facts necessary to state a claim on the theory alleged, where she has not alleged that CBA made any report to a credit reporting agency after the alleged dispute by Ms. Leapai regarding Ms. Leapai's debt.

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DATED this 28th day of July, 2016.

LEE SMART, P.S., INC.

By: _/s /Marc Rosenberg ________________
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CERTIFICATE OF SERVICE

I hereby certify that on the date provided at the signature below, I electronically filed the preceding document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following individuals:

Ms. Marin Dzhamilova mdzhamilova@hotmail.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Dated this 28th day of July, 2016 at Seattle, Washington.

LEE SMART, P.S., INC.

By: /s Marc Rosenberg
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